

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE HYDROXYCUT MARKETING
AND SALES PRACTICES LITIGATION

Case No. 09md2087 BTM(CAB)

VELMA J. CARTER, an individual;
SUREE WANDA BRYSON, an individual;
RAYMOND C. LEE, and individual;

Case No. 10cv2580 BTM(CAB)

Plaintiffs,

v.

**ORDER GRANTING MOTION TO
DISMISS FOR LACK OF
JURISDICTION AS TO IOVATE
COPYRIGHT LTD.; DENYING
MOTION TO DISMISS; AND
DENYING AS MOOT MOTION TO
AMEND COMPLAINT**

MUSCLETECH RESEARCH AND
DEVELOPMENT, INC., et al.,

Defendants.

Defendant Iovate Copyright Ltd. ("Copyright") has filed a motion to dismiss for lack of personal jurisdiction. The other defendants ("Defendants") have filed a motion to dismiss Plaintiffs' Complaint for failure to state a claim. Plaintiffs have filed a motion to file an amended complaint that adds factual allegations in support of their fraud claims. For the reasons discussed below, Copyright's motion to dismiss is **GRANTED**, Defendants' motion to dismiss is **DENIED**, and Plaintiffs' motion for leave to amend is **DENIED AS MOOT**.

I. BACKGROUND

On September 30, 2010, Plaintiffs filed their complaint in the Northern District of Alabama (Alabama Civil Case No. 10-cv-2655-AKK). On December 15, 2010, the case was transferred to the Southern District of California as a tag-along action to the In re Hydroxycut Marketing and Sales Practices multi-district litigation currently pending before the Court.

1 Upon transfer, the case was assigned a separate civil case number in the Southern District
2 of California (Case No. 10cv2580 BTM(CAB)).

3 Plaintiff Velma J. Carter is a resident of Mississippi. Plaintiff Suree Wanda Vryson is
4 a resident of South Carolina. Plaintiff Raymond C. Lee is a resident of Washington, D.C.
5 According to the Complaint, Plaintiffs purchased "Hydroxycut products" at Wal-mart and
6 suffered physical injury as a result of the consumption of such products.

7 Plaintiffs assert the following claims against the defendants: (1)
8 negligence/wantonness; (2) product liability; (3) intentional misrepresentation; (4) negligent
9 misrepresentation; (5) breach of express warranty; (6) breach of implied warranty of
10 merchantability; (7) breach of implied warranty of fitness for particular purpose; (8) unjust
11 enrichment; and (9) fraud and misrepresentation.

12 After Defendants filed their motions to dismiss, Plaintiffs filed a First Amended
13 Complaint (misabeled "Second Amended Complaint") pursuant to a stipulation of the parties.
14 The First Amended Complaint ("FAC") adds new defendants as well as more factual
15 allegations in support of Plaintiffs' fraud claim. The Court construes the motion to dismiss
16 for failure to state a claim to apply to the FAC.

17 18 **II. DISCUSSION**

19 20 **A. Copyright's Motion**

21 Copyright has filed a motion to dismiss for lack of personal jurisdiction. Because this
22 case was originally filed in the Northern District of Alabama, this Court can exercise personal
23 jurisdiction over Copyright only to the extent that the Northern District of Alabama could have.
24 In re Dynamic Random Access Memory, 2005 WL 2988715, at * 2 (N.D. Cal. Nov. 7, 2005).

25
26 Copyright contends that Plaintiffs have not made out a prima facie case of either
27 general or specific jurisdiction, as needed to satisfy federal due process. See Helicopteros
28 Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414 (1984). According to the declaration

1 of Jo-Ann Heikkila, Copyright is a Canadian corporation which has never been licensed to
 2 do business in the United States, has never maintained an office or bank account in the
 3 United States, has never maintained a website accessible by United States citizens, and has
 4 not had any involvement in the manufacture, sale, or advertisement of Hydroxycut-branded
 5 products.

6 Plaintiffs did not file an opposition to Copyright's motion. Plaintiffs' Complaint itself
 7 merely states that "[a]t all times relevant hereto, Iovate Copyright, Ltd. was and is doing
 8 business within this judicial district." (Compl. ¶ 10.) The Complaint does not set forth any
 9 factual allegations supporting this conclusory statement.

10 When a defendant brings a motion to dismiss for lack of personal jurisdiction, the
 11 plaintiff bears the burden of establishing that jurisdiction is proper. Sher v. Johnson, 911
 12 F.2d 1357, 1361 (9th Cir. 1990). If the district court decides the motion without holding an
 13 evidentiary hearing, "the plaintiff need only make a prima facie showing of the jurisdictional
 14 facts." Id.

15 Plaintiffs have not alleged any facts tending to show that the Northern District of
 16 Alabama has general or specific jurisdiction over Copyright. Therefore, Plaintiffs have failed
 17 to make out a prima facie showing of personal jurisdiction, and the Court **GRANTS**
 18 Copyright's motion to dismiss for lack of personal jurisdiction.

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 20 B. Defendants' 12(b)(6) Motion to Dismiss & Plaintiffs' Motion for Leave to Amend

21
 22 1. Fraud Claims

23 Defendants contend that Plaintiffs' fraud-based claims (intentional misrepresentation,
 24 negligent misrepresentation, and fraud and misrepresentation) fail because Plaintiffs have
 25 failed to satisfy the pleading requirements of Fed. R. Civ. P. 9(b).

26 Originally, Plaintiffs failed to identify what Hydroxycut product they took, when the
 27 product was consumed, what fraudulent statements or materials they relied on, how or where
 28 the misrepresentations were made, and when the fraudulent misrepresentations occurred.

1 In the FAC, Plaintiffs have added factual allegations remedying these defects. (FAC ¶ 52.)
 2 The Court is satisfied that Plaintiffs have pled fraud with sufficient specificity.

3 Defendants argue that Plaintiff Lee's claim for "negligent misrepresentation" must be
 4 dismissed because Virginia law does not recognize a cause of action for "negligent
 5 misrepresentation." Under Virginia law, the proper name for such a claim is "constructive
 6 fraud." See Hansen v. Stanley Martin Companies, Inc., 585 S.E.2d 567, 573 n. 4 (Va. 2003)
 7 ("Negligent misrepresentation is the essence of a claim for constructive fraud in Virginia.");
 8 Goff v. J. Sargeant Reynolds Comm. College, 2004 WL 2093444, at * 2 (Va. Cir. Ct. Sept.
 9 20, 2004) (explaining that plaintiff asserting counts for intentional misrepresentation and
 10 negligent misrepresentation really alleged "actual and constructive fraud.") However, the
 11 Court will not dismiss Plaintiff Lee's claim merely because it is mislabeled "negligent
 12 misrepresentation."

13

14 2. Breach of Warranty Claims

15 Defendants argue that Plaintiffs' breach of warranty claims fail to state a claim
 16 because Plaintiffs did not plead that they gave Defendants notice of the breach before filing
 17 suit.

18 Under the U.C.C., where a tender of goods has been accepted, "the buyer must within
 19 a reasonable time after he discovers or should have discovered any breach notify the seller
 20 of breach or be barred from any remedy" U.C.C. § 2-607(3)(a). It appears that the
 21 weight of authority holds that the U.C.C.'s notice requirements do not rigidly apply to
 22 *consumer buyers* who suffered *personal injuries* as a result of the breach of warranty. See,
 23 e.g., Connick v. Suzuki Motor Co., Ltd., 675 N.E. 2d 584, 590 (Ill. 1996); Smith v. Stewart,
 24 667 P. 2d 358, 365 (Kan. 1983); Maybank v. S.S. Kresge Co., 273 S.E.2d 681, 684-85 (N.C.
 25 1981).

26 Plaintiffs point out that South Carolina's version of U.C.C. § 2-607(3)(a) specifically
 27 states "no notice of injury to the person in the case of consumer good shall be required."
 28 S.C. Code § 36-2-607(3)(a). As for Virginia law and Mississippi law, the cases cited by

Defendants do not hold that consumers who suffer personal injury must give notice before filing a claim for breach of warranty. Accordingly, the Court denies Defendants' motion to dismiss the breach of warranty claims for failure to give notice.

3. Unjust Enrichment

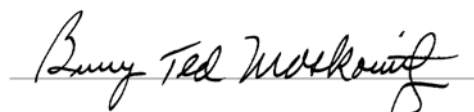
Defendants move to dismiss Plaintiff Velma Carter's unjust enrichment claim on the ground that unjust enrichment is not an independent theory of recovery under Mississippi law. Although Carter may not be able to bring a free-standing claim of unjust enrichment, such a claim is not necessarily improper if it is accompanied by predicate claims upon which relief could be granted. See Cole v. Chevron USA, Inc., 554 F. Supp. 2d 655, 673 (S.D. Miss. 2007) (explaining that "a claim for unjust enrichment depends upon a showing of some legally cognizable wrong by which a defendant has been unjustly enriched at the expense of the plaintiff."). It makes little difference whether the claim for the remedy of unjust enrichment is asserted in a separate count or in a prayer for relief.

III. CONCLUSION

For the reasons discussed above Iovate Copyright Ltd.'s motion to dismiss for lack of personal jurisdiction [09md2087 - Doc. No. 444 ; 10cv2580 - Doc. No. 11] is **GRANTED**. Plaintiffs' claims against Iovate Copyright Ltd. are **DISMISSED** due to the lack of personal jurisdiction. Defendants' motion to dismiss [09md2087 - Doc. No. 445; 10cv2580 - Doc. No. 12] is **DENIED**. Plaintiffs' motion for leave to file an amended complaint [09md2087 - Doc. No. 491; 10cv2580 - Doc. No. 14] is **DENIED AS MOOT**. Defendants shall file an answer to the FAC within 20 days of the entry of this Order.

IT IS SO ORDERED.

DATED: May 24, 2011



Honorable Barry Ted Moskowitz
United States District Judge